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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Court of Appeals of the State of New York made July 7, 1966 (18 N.Y. 2d 650). That order* affirmed an order of the Appellate Division of the Supreme Court,** dated November 29th, 1965 (24 A.D. 2d 900) which modified, and as modified, affirmed an order made by Honorable Dominic S. Rinaldi, a Justice of the Supreme Court Kings County (42 Misc. 2d 403) under date of March 13th, 1964.***

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* Respondent's Appendix A.

** Respondent's Appendix B.

*** Respondent's Appendix C.

Previous Proceedings

Petitioner at all times herein concerned rested under five indictments found by the Grand Jury of Kings County in 1960. Each charged him with the commission of the crime of Abortion. In the course of judicial proceedings respecting these indictments he for the first time learned,—quite accidentally,—that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name. His knowledge of the existence of this order came solely through a voluntary disclosure of its making by a representative of the District Attorney of Kings County during judicial argument. The disclosure was not only voluntarily made; indeed, it may well have been unnecessary to the purposes of the judicial proceedings then in progress. Certainly it is correct to say that petitioner's awareness of the existence of the order was entirely fortuitous.

Petitioner then moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacatur of the authorizing order itself.

After argument before Honorable George A. Arkwright, a Justice of the Supreme Court, Kings County, the motion was denied by an order of February 26, 1963.

Petitioner appealed from the order. On April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals wrote an opinion.

Petitioner then petitioned this Court for a writ of certiorari to review the order made by Arkwright, J., but the Court on January 13, 1965 denied and dismissed the petitioner (375 U.S. 985).

After the denial by Fuld, J. and the Court of Appeals of leave to appeal to that Court, but before the final action of this Court in denying the petition for certiorari, hearings which had begun on a motion in the former Kings County Court were resumed in the Supreme Court for relief, identical with that denied by Arkwright, J. This motion was claimed to be necessitated by the reorganization of the New York Courts pursuant to which the former County Court was merged with and became part of the Supreme Court and former County Judge Rinaldi became

a Justice of the Supreme Court. The long and voluminous hearings resulted in the order made by Rinaldi, J. (Respondent's Appendix "C") which we here summarize for the convenience of this Court.

The order vacated the July 28, 1960 telephone interception order made by Keogh, J., restrained and precluded the District Attorney of Kings County and the Police Department from using upon petitioner's trial all telephone conversations obtained as a result of the wiretaps and all leads, clues and information directly or indirectly obtained as a result thereof; restrained and precluded the District Attorney from calling as witnesses upon petitioner's trial the female persons named in the indictments against him as the abortees; restrained and precluded the District Attorney and the police from using upon the trial all evidence seized by a search of petitioner's home and office; and directed the return of the property thus seized.

The People appealed from this order. As a preliminary necessitated by Section 518-a of the Code of Criminal Procedure* the People asserted that the deprivation of the use as evidence of the property ordered to be returned or suppressed had rendered the sum of the proof available to the People with respect to the criminal charges filed against petitioner either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charges to a conviction had been effectively destroyed.

The Appellate Division modified the order by reversing that portion thereof which had held the original wiretap order invalid and also by reversing that portion which had

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* Respondent's Appendix D.

precluded the People from using upon petitioner's trial the testimony of the prosecutrices; and as thus modified, affirmed.

Pursuant to permission granted by Fuld, J. on January 25, 1966 petitioner appealed to the New York Court of Appeals from the Appellate Division order. The Court of Appeals affirmed by the order of July 7, 1966 previously referred to as Respondent's Appendix A.

The present petition for the issuance of the writ of certiorari by this Court followed.

Jurisdiction

Jurisdiction for the present petition is sought to be invoked under 28 U.S.C. Section 1275(3). It is contended that petitioner's rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Federal Constitution and under 47 U.S.C. Section 605, were violated. It is, in amplification of this contention, asserted that New York's Code of Criminal Procedure, Section 813-a is repugnant to these amendments and to this statute (in the latter case because of the supremacy clause contained in Article 6 of the Federal Constitution).

It is our answer that no Federal question, constitutional or otherwise, exists. That is to say, New York as a sovereign State is constitutionally empowered to enact the statute which permits the tapping of private telephones and the full utilization of information procured by such interception. We answer also that the affidavits which were the basis of the issuance of the original wiretap order by

Keogh, J. were sufficient in law and that the order itself was therefore legally and constitutionally valid. Consequently, the suppression of evidence procured by the utilization of this order was an improper exercise of judicial power by Rinaldi, J.

In sum, Code Crim. Pro. Section 813-a,* which is the New York statute permitting the issuance of ex-parte orders for eavesdropping, including telephone wiretapping, is constitutional and the use on a criminal trial of evidence procured under the aegis of an order issued pursuant to its provisions does not offend the Fourth Amendment, the Fifth Amendment, or the Fourteenth Amendment, of the Federal Constitution.

Clarification of the Issues Presented by the Petition

Throughout the petition (and notably at pages 26-37 thereof), reference is made to alleged improper police conduct in losing a desk diary calendar belonging to petitioner, in not preparing and retaining a full report of police activities, in coercing from a prosecutrix (Esther Richards) statements referring to an abortion committed upon her by the petitioner and, ultimately, in arresting her.

It is our submission that none of these alleged facts creates a Federal question for the scrutiny of this Court and therefore we enter into no combative analysis of the evidence which would disprove and destroy these claims of impropriety.

There is another reason which, though procedural in nature, with equal force debars petitioner from a review

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* Respondent's Appendix E.

of these claims by this Court. His petition asserts that although Rinaldi, J. who in the first instance "conducted the hearing on the motion to suppress the product of the search and the wiretap [had] ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled", nevertheless (pet. p. 5) the State appellate Courts "in reviewing the suppression order have not ruled on the latter issue of intermingling * * *" (pet. p. 5). We ask the question: if the State appellate Courts have not ruled upon this contention, how can petitioner present the question to this Court for its ruling? The answer is obvious: he cannot ask this Court to review what he asserts was not reviewed by the State appellate Courts.

POINT I

Appellant's petition is premature.

Appellant's petition (p. 3) recognizes that because "it is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved", there is a strong possibility that the petition is premature. The petitioner seeks to escape the consequences of the prematurity which he fears by arguing that, having been deprived of the benefit of the original order of suppression, he does not have that happy condition which he would have, had the New York appellate Courts not deprived him of that benefit. That benefit would have included the total inability of the People to call the abortion prosecutrices as

witnesses and, as petitioner quite correctly says (p. 4), would have terminated the criminal prosecution.

We express our admiration for the mental ingenuity which can construct such an argument in total disregard of the governing law.

It is, we submit, obvious beyond successful contradiction that although the petition is couched in terms of a review of an order which in its technical import sustains a wire-tap order and, derivatively, denies an order to suppress evidence procured by its utilization, what petitioner actually seeks in the present proceeding is to prohibit a State trial of pending indictments. We say "prohibit" advisedly, because factually petitioner's success in this litigation would terminate the prosecution. And, since the greater includes the lesser, termination necessarily includes prohibition.

It is settled Federal law that Federal Courts possess the equitable power to enjoin a State prosecution (*Ex parte Young,* 209 U.S. 123). It is, however, equally well settled that:

> "* * * considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." (*Dombrowski* v. *Pfister,* 380 U.S. 479).

The Court said in *Douglas* v. *City of Jeannette,* 319 U.S. 157:

> "* * * courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from

> prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'."

It is our submission that the instant case is an apt illustration of the doctrine. If the People are permitted to proceed with the prosecution to its termination, petitioner will be either (1) acquitted, or (2) convicted. Should the second eventuality occur, petitioner will have adequate avenues of relief by way of State appeal and, if there unsuccessful, eventually in the avenues of certiorari and/or Federal writ of habeas corpus.

This principle of non-intervention is exemplified with especial pertinence in the decision of the United States Court of Appeals for the Second Circuit in *Williams* v. *Ball, District Attorney of Erie County,* 294 F. 2d 94. There the Court refused to restrain the prosecution of a New York criminal case because wiretap evidence was to be used on the trial. The Court said:

"The Court was also right in refusing to entertain plaintiffs' request for a judgment, under 28 U.S.C. Section 2201, declaring the New York legislation invalid. Even if the court were to determine that issue in plaintiffs' favor such a decision would not avail them. The wire-tap evidence would still be receivable in the state trial so long as the Supreme Court adheres to the clear holding of Schwartz v. State of Texas, 1952, 344 US 199, 203, 73 S. Ct. 232, 235, 97 L. Ed. 231, 'that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings.' We do not read Mapp v. Ohio, 1961, 367 US 643, 81 S. Ct. 1684, as overruling sub silentio Schwartz v. State of Texas—on which six Justices had expressly relied, only four months earlier, in the per curiam affirmance, 1961, 365 US 458, 81 S. Ct. 650, 5 L. Ed. 2d 678, of our decision in Pugach v. Dollinger, 2 Cir., 1960, 277 F. 2d 739."

POINT II

Code Crim. Pro. Section 813-a offends no provision of the Federal Constitution.

We call the Court's attention to the notable safeguards against the indiscriminate exercise of Section 813-a (Respondent's Appendix E).

The applicant must be either the District Attorney or the Attorney General of the State or a police official of responsible rank. The application for the order must be based upon a showing of reasonable ground for the belief that evidence of crime may be obtained by the wiretap. The identity of the persons involved must be described.

The Justice or Judge to whom the application is made has power to examine under oath as to these matters and he must be judicially satisfied "of the existence of reasonable grounds for the granting of such application."

One notes immediately the resemblance existing between these requirements and those which safeguard the rights of citizens in respect to the issuance of search warrants. Code of Criminal Procedure, Section 793 provides that:

> "A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 794 of the Code requires that:

> "The Magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Then, and only then, may he issue the search warrant.

The statute was enacted pursuant to the provisions of New York Constitution, Article 1, Section 12:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

We are confident that the statute may not be successfully attacked upon any claim that New York's Legislature was careless and improvident in the exercise of its authority. Only a conclusive showing of repugnance to a Federal Constitutional prohibition can avail petitioner. We shall demonstrate that the statute does not thus offend.

Our demonstration is grounded on the decisions of this and other Courts concerned with telephone wiretapping and interception.

The Court for the first time considered the question in *Olmstead* v. *United States,* 277 U.S. 438. The Court held that although the State of Washington prohibited telephone wiretapping, evidence procured in this manner by agents of the United States was nevertheless admissible against defendants in a Federal prosecution for conspiracy to violate the National Prohibition Act. The specific holding of the Court was that such evidence was not repugnant to either the Fourth Amendment prohibiting unreasonable searches and seizures or the Fifth Amendment prohibiting compulsory self-incrimination.

It is true that Holmes, Brandeis, Butler and Stone, J.J. dissented in separate opinions. However, it cannot be questioned that evidence procured through telephone wiretapping remained constitutionally admissible in Federal Court prosecutions until the enactment by Congress of 47 U.S.C. Section 605 (Federal Communications Act).

The Court made it clear in the two *Nardone* cases (*Nardone* v. *United States,* 302 U.S. 379; *Nardone* v. *United States,* 308 U.S. 338), that the exclusionary effect of Section 605 was applied in Federal prosecutions to Federal agents,

but that the rule of exclusion arose solely through the operation of the statute.

It is also indisputable that this Court as late as *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, refused to impose Section 605 upon the several States. Minton, J. wrote for a Court in which only Douglas, J. dissented:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested (citing).
>
> It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.
>
> We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

The force of this clear and precise decision has not been minimized by *Benanti* v. *United States*, 355 U.S. 96.

In *Benanti*, the Court explicitly refused to rule upon the contention that evidence, obtained as the result of wiretapping by State law enforcement officers without participation by Federal authorities, was barred by the Federal Constitution as well as by Section 605 from reception in a Federal prosecution:

> "We do not reach the constitutional questions as this case can be determined under the statute."

The Court did hold that the evidence was rendered inadmissible in the Federal Court by the statute when obtained by either State or Federal agents through wiretapping.

True, the Court also said that Congress was constitutionally empowered to make Section 605 applicable to State agents, even where the State itself authorizes wiretapping "in the exercise of its legitimate police functions". ("It is undisputed that an order pursuant to that law was issued in this case and that it was executed according to State law".)

True it is, also, that the Court held that Congress had intended to prohibit wiretapping even under the aegis of State legislation:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

Petitioner, however, cannot take comfort in the last quoted language of the Court; nor can he correctly find in it a ruling that *Benanti* overruled *Schwartz* and that by implication, if in no other way, *Benanti* makes wiretap evidence inadmissible in a State prosecution (and derivatively renders unconstitutional a State statute authorizing wiretapping). This is the only possible construction of the Court's own footnote No. 19 in *Benanti*:

> "Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, supra, is not to the contrary. While it re-

> fused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated Section 605. 344 U.S., at 202."

In sum, the furthest reach of *Benanti* is that it recognizes the criminality under Section 605 of wiretapping *and* divulgence by a State officer, even though his acts have been done pursuant to a State Court order. It does not, however, affect the admissibility of the evidence thus procured in the courts of those states which choose to receive it.

Certainly this has been the construction of *Benanti* by New York's Court of Appeals. In *People* v. *Dinan*, 11 N.Y. 2d 350, Van Voorhis, J. wrote:

> "In affirming the judgments of conviction of these defendants on gambling indictments, we consider that the intercepted telephone conversations on which these convictions depend are not rendered inadmissible by recent Federal decisions."

In reviewing the course of Supreme Court decisions and Congressional legislation respecting wiretapping, Van Voorhis, J. wrote further:

> "In many criminal prosecutions evidence obtained by wire tapping authorized by orders granted under the New York State Constitution (art. I, Section 12) and Code of Criminal Procedure (Section 813-a) has been introduced in criminal trials in New York State Courts. In 1928 the United States Supreme Court held that the tapping of telephone wires is not in violation of the Fourth Amendment protecting against unreasonable searches and seizures (Olmstead v. United States, 277 U.S. 438, 465). In the opinion it was said: 'Congress may of course protect the secrecy of telephone messages by making

them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.'

Six years later, in June, 1934, section 605 of the Federal Communications Act was enacted in response to this suggestion. Section 605 was held to render wiretap evidence inadmissible in the Federal courts in Nardone v. United States (302 U.S. 379) but to permit their introduction into evidence in trials in State courts (Schwartz v. Texas, 344 U.S. 199). That was the condition of the law when the United States Supreme Court was called upon in 1957 to decide Benanti v. United States (355 U.S. 96) which reaffirmed the doctrines enunciated in both Nardone v. United States and Schwartz v. Texas. The opinion in Benanti, by Chief Judge Warren (p. 101), says concerning Schwartz: 'The rationale of that case is that despite the plain prohibition of Section 605 (Federal Communications Act), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.' The Schwartz case was a wire-tapping case. The Supreme Court indicated in it that section 605 of the Federal Communications Act is violated by the procedure for obtaining wire taps prescribed by the New York Constitution and statutes, but made clear that such violations of this Federal statute are not sufficient to justify preventing the States from receiving such evidence in trials in State courts. The Federal statute itself contains no language forbidding the admission of such evidence in any courts. Benanti, Nardone and Schwartz held the means of obtaining such evidence to be illegal, but ruled that it was a question of

> policy of the forum whether the enforcement of section 605 of the Federal Communications Act should be implemented by imposing an exclusionary rule. Wire taps, it should be repeated, do not infringe constitutional immunity against unreasonable searches and seizures (Olmstead v. United States, supra). Exclusion of such testimony was ordained in the United States courts as a policy measure to aid in the enforcement of section 605. A contrary policy has been adopted in New York State (People v. Variano, 5 N.Y. 2d 391; People v. Dinan, 7 A D 2d 119, 6 N.Y. 2d 715), pursuant to the power reserved in the States by Schwartz v. Texas (supra)."

New York's Court of Appeals has very recently adhered to its position that the reception of wiretap evidence offends no constitutional prohibition.

In *People* v. *McCall*, 17 N.Y. 2d 152, the Court was concerned with the procedure available to a defendant whose telephone was affected by a wiretap order. The Court, however, clearly assumed the admissibility of such evidence, provided only that the affidavit upon which the order authorizing the interception was based conformed to the statutory requirements of probable cause (see p. 31, seq. of this brief). Of the seven Judges comprising that Court only Desmond, C.J. and Fuld, J. continued to believe that such evidence should be rendered inadmissible in New York Courts. But Judge Fuld does not base his position upon any belief that wiretapping is unconstitutional. He objects to its reception because he believes that since Section 605 of the Federal Communications Act makes it criminal to divulge the product of a telephone wiretap, " • • • the necessity to avoid commission of a criminal act within the very room where the trial is being held demand that evidence obtained in

violation of the Federal Communications Act be ruled inadmissible."

Chief Judge Desmond, it is true, believes that wiretapping does violate the Fourth and Fifth Amendments (dissenting opinion in *People* v. *McCall, supra*).

We understand, of course, that justice does not rest upon a quantitative basis. Judicial authority, however, does. The settled policy in New York, reaffirmed by a five Judge majority in its Court of Appeals, was aptly expressed by Bergan, J. in *McCall, supra*:

> "The interception of telephone wires by police under Court supervision, by well-founded Judges' orders, is an effective and useful aid in law enforcement and in some types of prosecution it is, indeed, quite indispensable."

We are therefore firm in our belief that, when to the unbroken current of decision in this Court that wiretap evidence is still admissible in State criminal trials, there is added the enduring opinion of five Judges of New York's Court of Appeals, petitioner's assertions to the contrary rest upon a foundation of sand.

Mapp v. *Ohio*, 367 U.S. 643, has not affected the correctness of the New York Court of Appeals position. Van Voorhis, J. had so written for the Court in *Dinan* (11 N.Y. 2d 350):

> "Appellants argue that the decision in Mapp v. Ohio (367 U.S. 643), in 1961, deprived the States of the power reserved to them in Schwartz v. Texas (supra) to give effect to their own public policies in this re-

gard. It is said that Mapp v. Ohio overruled Schwartz v. Texas by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by Mapp into the Fourth Amendment, which was held to have been mandated on the States (in this respect) by the Fourteenth Amendment to the Constitution of the United States.

The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."

New York's rule (vide *Dinan, supra*) has the concurrence of the respected United States Court of Appeals for the Second Circuit.

In *United States ex rel. Graziano* v. *McMann, Warden,* 275 F. 2d 284 (1960), the Court of Appeals for the Second Circuit unanimously affirmed an order which denied a petition for a Federal writ of habeas corpus brought on by a defendant whose conviction in a New York Court had been affirmed by the Appellate Division (3 App. Div. 2d 1010) and the Court of Appeals (4 N.Y. 2d 881), and to whom this Court had denied certiorari (358 U.S. 851). The petition for the writ of habeas corpus was grounded upon a contention that evidence obtained as a result of a wiretap made pursuant to Court order under Code Crim. Pro. Section 813-a had been improperly admitted against him in the State Court trial. Waterman, C.J. wrote for a unanimous Court:

"We have no difficulty in unanimously affirming the District Court, despite the fact that evidence pre-

sented against appellant was obtained and divulged in violation of 47 U.S.C.A. Section 605. We believe that Schwartz v. State of Texas, 1952, 344 U.S. 199, 73 S. Ct. 232, 96 L. ed. 231, is complete authority for the result we reach. Provided it has logical reference to the proof required to establish guilt, wiretap evidence obtained by New York State officers who have been affirmatively authorized to tap pursuant to Section 813-a of the State Code of Criminal Procedure is held by the New York Court of Appeals to be admissible in criminal cases in the New York Courts. People v. Variano, 1959, 5 N.Y. 2d 391, 185 N.Y.S. 2d 1, 157 N.E. 2d 857; People v. Saperstein, 1957, 2 N.Y. 2d 210, 159 N.Y.S. 2d 160, 140 N.E. 2d 252. Cf. People v. Dinan, 2nd Dept., 1958, 7 A.D. 2d 119, 181 N.Y.S. 2d 122, Affirmed 1959, 6 N.Y. 2d 715, 185 N.Y.S. 2d 806; 158 N.E. 2d 501, certiorari denied 1959, 361 U.S. 839, 80 S. Ct. 71, 4 L. ed. 2d 78. Even though, unless authorized by the sender, evidence obtained by intercepted wiretap would be clearly inadmissible in a federal court, Nardone v. United States, 1937, 302 U.S. 379, 58 S. Ct. 275, 82 L. ed. 314; Weiss v. United States, 1939, 308 U.S. 321, 329, 60 S. Ct. 269, 84 L. ed. 298, introduction of the identical wiretap evidence in New York State Courts, although clearly violative of the federal prohibitory statute, is not thereby prevented. Wolf v. People of State of Colorado, 1949, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652. Cf. Benanti v. United States, 1957, 355 U.S. 96 at page 101, 78 S. Ct. 155, 2 L. ed. 2d 126.

As was stated in Schwartz v. State of Texas, supra, 344 U.S. at page 201, 73 S. Ct. at page 234 '(e)nforcement of the statutory prohibition in Section 605 can be achieved under the penal provisions of Section 501.'

> There was no denial of any constitutional right. Schwartz v. State of Texas, supra. Appellant cannot be heard to complain because the wiretap communications were divulged and were of assistance in convicting him.
>
> Affirmed."

It bears repetition that Waterman, C.J. in reliance on *Schwartz* v. *Texas, supra,* stated:

> "There was no denial of any constitutional right."

It is also to be noted that the case was decided after *Benanti* and in evident construction and adoption of that case as authority.

This Court's affirmance in *Pugach* v. *Dollinger,* 375 U.S. 458, 5 L. ed. 2d 678, 81 S. Ct. 650, of a judgment of the Court of Appeals for the Second Circuit (277 F. 2d 739) (affirming a dismissal by the District Court. (180 F.S. 66) of a complaint seeking an injunction against the introduction in a State Court criminal trial of evidence procured through telephone wiretapping) is of great importance in the consideration of the present problem. The Court's brief *per curiam* opinion:

> "The judgment is affirmed on the authority of Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232 and Stefaneli v. Minard, 342 U.S. 179, 96 L. ed. 138, 72 S. Ct. 118."

is as dispositive of the question as would be reams of writing on the subject. As we have demonstrated, *Schwartz* v. *Texas, supra,* explicitly held that it was not the intention of Congress in enacting Section 605 to bar the introduction of wiretap evidence in State Court trials. When, therefore,

this Court in *Pugach, supra,* affirmed on the authority of *Schwartz, supra,* it by necessary and inescapable inference reaffirmed its construction of Section 605.

The judicial and legislative history which we have outlined as our premise completely justifies the conclusion which we now urge. It is: if the Fourth and Fifth Amendments to the Federal Constitution and Section 605 of the Federal Communications Act do not bar the reception in a State trial of wiretap evidence, then certainly they do not render unconstitutional the State statute,—Code Crim. Pro. Section 813-a,—whose sole and obvious purpose is so judicially to safeguard the procurement of such evidence as to reduce to the barest possible minimum the danger of unwarranted intrusion upon the privacy of innocent citizens and at the same time to insure in the greatest possible maximum effect the prosecution of criminals.

Petitioner's brief shifts to another ground: that Section 813-a is unconstitutional "as offending against the ban against 'general searches' also termed 'searches for mere evidence' ".

In support of the argument the petition does the expected: it begins with *Gouled* v. *United States,* 255 U.S. 298 and ends with the dissenting opinion of Brennan, J. in *Lopez* v. *United States,* 373 U.S. 427.

We treat the latter aspect first.

It is fundamental in any consideration of the Fourth Amendment that the Constitution forbids, not all searches, but only unreasonable searches. It was early noted by Cardozo, J. as a Judge of the New York Court of Appeals in *People* v. *Chiagles,* 237 N.Y. 193 that:

> "The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions."

Stated in another fashion (*United States* v. *Rabinowitz*, 339 U.S. 56):

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmuspaper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

The classic definition of "reasonableness",—the definition quoted innumerable times in all the Courts of the Union,—was given by this Court in *Brinegar* v. *United States*, 338 U.S. 160:

> "And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, Ch.J., said for the Court more than a century ago in Locke v. United States, 7 Cranch (U.S.) 339, 348, 3 L. ed. 364, 367. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

The Court went on to say:

> "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often op-

posing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

It is our submission that the protection of a valid Court order authorizing telephone wiretapping predicated on probable cause constitutionally meets the requirements of probable cause as enunciated in *Brinegar, supra.* We have shown (pp. 10 seq. this brief) the safeguards which Section 813-a erects against the whim, caprice or oppression of the police. We have shown the complete identity between these safeguards and those surrounding the issuance of a search warrant pertaining to Code Crim. Pro. Section 793.

Nor is it to be forgotten that New York has in addition enacted statutes imposing criminal sanctions upon wiretapping not authorized by proper Court order.

Penal Law, Section 742 makes it criminal to possess "any device, contrivance, machine or apparatus designed or commonly used for eavesdropping as defined in Section 738 of this chapter, under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for eavesdropping, or knowing the same is intended to be so used." The statute translates a misdemeanor into a felony if the person convicted had been previously convicted of any crime.

More: Civil Practice Law and Rules, Section 4506 makes evidence obtained by any act of eavesdropping in violation of Penal Law, Section 738 "* * * inadmissible for any purpose in any civil or criminal action, proceeding or hearing."

Indeed, it is not too much for us to say that the combined protection provided against illicit eavesdropping by these New York statutes is greater than that which the present state of Federal Law affords. This Court in *Goldman* v. *United States*, 316 U.S. 129, affirmed a judgment of conviction upon the basis of evidence procured by use of a listening apparatus, part of which was located in the defendant's office and which was connected with the defendant's telephone in such way as to enable the Federal agents, then in an adjacent room, to overhear his conversations. In New York today this evidence would clearly be inadmissible (CPLR Section 4506, *supra*) and the listener would be subject to the penalties of Penal Law, Section 742, *supra*. It is noteworthy that even Murphy, J. in his dissent wrote:

> "A warrant can be devised which would permit the use of a detectaphone. Cf. Article 1, Sec. 12 of the New York Constitution (1938). And, while a search warrant, with its procedural safeguards has generally been regarded as prerequisite as to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendmend applies (see Agnello v. United States, 269 U.S. 20, 32, 70 L. ed. 145, 148, 46 S. Ct. 4, 51 A.L.R. 409), some method of responsible administrative supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusions by Government officers. See 8 Wigmore, Evidence, 3d ed. Sec. 2184b, pp. 51, 52.
>
> While the detectaphone is primarily used to obtain evidence, and while such use appears to be condemned by the rulings of this Court in Gouled v. United States, 255 U.S. 298, 65 L. ed. 647, 41 S. Ct. 261, and United States v. Lefkowitz, 285 U.S. 452, 76 L. ed.

877, 52 S. Ct. 420, 82 A.L.R. 775, I am not prepared to say that this purpose necessarily makes all detectaphone 'searches' unreasonable, no matter what the circumstances, or the procedural safeguards employed. Cf. Marron v. United States, 275 U.S. 192, 72 L. ed. 231, 48 S. Ct. 74. See 8 Wigmore, Evidence, 3d ed. Sec. 2251, 2264; 31 Yale L.J. 518, 522; Chafee, Progress of the Law, 1919-1922, 35 Harvard L. Rev. 673, 699; 32 Columbia L. Rev. 386; 1 Cooley, Constitutional Limitations, 8th ed. p. 625."

And even Brennan, J. dissenting in *Lopez, supra*, wrote:

"Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional.

But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment', Ohio ex rel. Eaton v. Price, 364 U.S. 263, 272, 4 L. ed. 2d 1708, 1714, 80 S. Ct. 1463 (separate opinion); see McDonald v. United States, 335 U.S. 451, 455, 93 L. ed. 153, 158, 69 S. Ct. 191; Abel v. United States, 362 U.S. 217, 251, 252, 4 L. ed. 2d 668, 693, 80 S. Ct. 683 (dissenting opinion), could be made a precondition of lawful electronic surveillance. And there have been numerous suggestions of ways in which electronic searches could be made to comply with the other requirements of the Fourth Amendment.

That is not to say that a warrant that will pass muster can actually be devised. It is not the busi-

> ness of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one. Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated." (373 U.S. at pp. 464-465).

Chief Justice Warren also noted in his concurring opinion in *Lopez*:

> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."

We submit that a decision by this Court upholding the constitutionality of Section 813-a of the New York Code of Criminal Procedure is essential in order to effectuate the principle enunciated in *Carroll* v. *United States*, 267 U.S. 132, that the Fourth Amendment must be construed "in a manner which will conserve public interests as well as the interests and rights of individual citizens". Although the

right to privacy is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (Brandeis, J. dissenting in *Olmstead* v. *United States, supra*), even that right must be fairly balanced against the right of law-abiding citizens "to be protected against law breakers and criminal interference with their liberty and property" (*United States* v. *Gone*, 354 F. 2d 119, 2nd Cir. En Banc). It is not too much to ask of this Court that in deciding the instant petition it have in mind the view of Fuld, J. expressed by him in *People* v. *Cocco*, 305 N.Y. 282:

> "An accused has his rights, and they must not be relaxed, but the State has its rights too. It is for the Courts 'to keep the balance true' (Snyder v. Massachusetts, 291 U.S. 97)."

We advert now to petitioner's reliance upon *Gouled* v. *United States*, 255 U.S. 298 as the other basis for his attack upon the constitutionality of Section 813-a. Petitioner finds in *Gouled* authority for his contention that a search for what he considers to be "mere evidence" is unconstitutional; and that of course telephone interception must be a search for "mere evidence" since it is by its very nature the discovery *in futuro* of evidence which can have no inevitable relationship to the fruits of crime, to the instrumentalities by which it was committed, or to contraband.

With due deference to the formulator of the argument, we must say that it is not an original conception. It is almost *in haec verba* the expression of the same point of view by Chief Judge Desmond in his *McCall* dissent, *supra*. With great deference to the Chief Judge, we think it obvious that the concept rests upon analogical reasoning which

has no basis in the history of the Fourth Amendment or in enforcement of that great right by this Court. What the Court said in *Olmstead, supra,* in rejection of the same argument that *Gouled* prohibits the reception of "mere evidence" is now we submit, just as correct and just as binding as it was when the Court made the pertinent distinction in *Olmstead*:

> "*Gouled* v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the records. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. *A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible.* Here we have testimony only of voluntary conversations secretly overheard. The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. A description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized." (Italics ours.)

It is notable that *Olmstead* was so decided with its repudiation of the applicability of *Gouled,* despite the fact that the State of Washington in which the case arose had by statute prohibited the wiretapping involved, under misdemeanor penalties. It is more than a rhetorical question

to ask: If the Court could thus decide *Olmstead* in the face of such statute, is it not obvious that wiretapping pursuant to a statute which implements a State Constitutional provision (Article 1, Section 12 of the New York State Constitution), permitting wiretapping, is equally absolved from the taint of unconstitutionality?

It is worth repeating that every case in which this Court has reprobated a physical search and (as in *Silverman* v. *United States,* 365 U.S. 506), the use of electronic devices involved a physical trespass into the defendant's premises: (e.g. in *Silverman* driving a spoke through his wall into his gambling headquarters). It is therefore a fact of determinative significance that in the case at bar no physical trespass on, or into, petitioner's premises occurred.

Detective George Colban, a Police Department specialist in installing and maintaining wiretapping equipment, testified that on July 29, 1960 he installed pursuant to Court order such equipment in order to intercept telephone calls over the defendant's number BE 6-3333. *The terminal of the defendant's wire was located not in his premises, but in the basement of an entirely different structure.* Moreover, it was in this different structure that Detective Colban installed the recorder upon which were noted the overheard conversations. The mechanical arrangement of this machinery was such that only defendant's incoming and outgoing 'phone calls would be heard over the device. Detective Colban categorically testified that at no time did he install or connect any instrument, apparatus or equipment of any kind to any portion of the telephone equipment physically located in the doctor's office on 5209 19th Avenue, Brooklyn.

POINT III

The original wiretap order of July 28, 1960 was legally issued upon adequate and proper affidavits.

Petitioner attacks the underlying affidavits supporting the July 28, 1960 wire-tap order on the two several grounds that (1) they are examples of defective hearsay and (2) that the events detailed therein were "stale" having occurred long before the issuance of the order. We shall demonstrate that both arguments rest upon a strained and unrealistic analysis of the affidavits.

The Appellate Division in its opinion (Respondent's Appendix F) wrote on this question only:

> "We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were sufficient."

In elaboration of the opinion, we refer more fully to the actual contents of the affidavits, confident that such reference will show the lack of justification for the strictures of the original hearing Court upon it (decision of Rinaldi, J. Respondent's Appendix G).

Rinaldi, J. noted that the wiretap order of July 28, 1960 was founded upon the affidavits of Alvin G. Rosen (26-27), Audrey Saltzman (28-29) and then Chief Assistant District Attorney J. Kenneth McCabe (23-25). His opinion (565-568) rejects these affidavits as insufficient to meet the Section 813-a requirement that the wiretap order be based upon "reasonable ground to believe that evidence of crime may be thus obtained".

In this aspect of the litigation,—obviously basically important on this appeal,—Rinaldi, J. was, we submit, clearly

wrong in rejecting Rosen's sworn assertion that he had given to police officers the information contained in the McCabe affidavit, and in similarly rejecting Audrey Saltzman's identical affidavit. It is necessary therefore to analyze what it was to which Mr. McCabe swore. Without reciting in undue detail, Mr. McCabe swore that a Miss Wertheimer had been the subject of three abortions performed but several years before for money by appellant Cohen. Moreover, Mrs. Saltzman had also only a few months before the wiretap order was issued gone with Rosen to appellant's office and had there arranged for the performance of another abortion. Only the fact that the criminal abortion ultimately proved to be unnecessary caused appellant to refrain from completing the crime.

The lower Court considered these affidavits of Mr. McCabe, Mr. Rosen and Mrs. Saltzman to be hearsay and for that reason an unreliable foundation for the wiretap order. The error into which the Court fell is obvious. It is because Mr. McCabe said in effect that he was told these things by Rosen and Mrs. Saltzman that the Court could technically classify the official's affidavit as hearsay. Only a moment's reflection, however, is necessary to show how inaccurate this characterization is. For if Mrs. Saltzman had in her affidavit recited the facts which she told to Mr. McCabe, then certainly her affidavit would not be hearsay. Similarly, this type of recital by Rosen would have deprived the Court below of its basis for the characterization. It is, we submit, a weak foundation indeed for a Justice of a Court to vacate the order of another Justice that the vacating Justice has no more than a semantic basis for his judicial conclusion.

The hearing Court deprecated Rosen's affidavit on another ground:

> "There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend on the reliability of their information."

Why there is this "serious question" is not even touched upon in the opinion. Two complete rejoinders to this assumed fact of inadequacy are available.

One is that the Justice who issued the wiretap order had an opportunity under the express terms of Code Crim. Pro. Section 813-a to "examine on oath the applicant and any other witness he may produce" and "satisfy himself of the existence of reasonable grounds for the granting of such application". There is not one scintilla of evidence in the protracted hearings on the suppression motion to indicate that Keogh, J. failed to conduct such an examination.

Furthermore, it is a matter of record in the Supreme Court, Kings County, that in the prosecution of an indictment against Edward Mahoney for Robbery, Rosen was an important witness for the People (Indictment No. 2616/60). The defendant was convicted of that crime and substantially sentenced. This Court will take judicial notice, we believe, of the procedure whereby, in procuring search warrants, police officers who act upon the statements of informers rely upon previous convictions based upon information received from these informers. It is settled law that while information derived from an informer whose reliability has not been established is itself insufficient foundation for a search warrant, nevertheless such information from an informer whose data has been checked by observations of the police or whose reliability has been estab-

lished by previous dealings with the police is of a different and sufficient quality (*People* v. *Coffey*, 12 N.Y. 2d 443; *People* v. *Malinsky*, 15 N.Y. 2d 86). In fine, Rosen's reliability is established by his participation in the above-mentioned prosecution.

Nor is the fact that Rosen and Saltzman "at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers" (see opinion, p. 567), a factor which deserved the importance attributed to it by the lower Court. It is an axiom of the administration of the criminal law that the activities of criminals are best known to other criminals. It is from this source that much, if not most, of police information is procured, and it is upon testimony emanating from such sources that many convictions are obtained. The only test to which the law subjects this type of testimony is that corroboration of an accomplice must be had "by such other evidence as tends to connect the defendant with the commission of the crime" (Code Crim. Pro. Section 399).

The Court of Appeals long ago aptly observed in *People* v. *Cohen*, 223 N.Y. 406, 422:

> "We must accept conditions as they exist. Criminals may tell the truth. If after weighing the story, in view of all the circumstances and all corroboration, it seems credible, we need not reject it merely because their reputation is bad or their habits vicious. Such facts are but a warning that caution should be used. For it is also to be remembered that in fixing the blame for such a crime as we are here considering the state is not likely to discover witnesses of high character."

Appellant's brief now seeks to engraft upon the affidavits a further defect: that they were stale in that they refer to events too remote in time to allow them to be used as the basis for the wiretap order. We shall not labor the point in argument here. "Staleness" is a relative matter, depending in every case upon the circumstances to which the defect is claimed to relate. As the Supreme Court said in *Sgro* v. *United States*, 287 U.S. 206:

> "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case."

When it is borne in mind that in the case at bar the defendant stands accused of a number of crimes of abortion, the factor of "staleness" disappears. An abortionist who has committed more than one such act began at a point in time, continued thereafter and could well be supposed to continue even after the last date concerned in the series of crimes and indictments. Viewed in this perspective it is, we submit, not accurate to conclude that Mrs. Saltzman's visit to appellant's office in February 1960 was "stale".

The suppression order was made by Mr. Justice Rinaldi on March 13, 1964 (45). It thus antedates by almost exactly a year the decision of the United States Supreme Court in *United States* v. *Ventresca*, 380 U.S. 102, decided March 1, 1965 and by more than a year the decision of the Court of Appeals in *People* v. *Rogers*, 15 N Y 2d 422, decided May

27, 1965. *Ventresca* furnishes the standard by which search warrant affidavits are to be decided.

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

In more concise form Desmond, C.J. wrote for a unanimous Court in *People* v. *Rogers, supra*:

> "The Assistant District Attorney on the argument of the present case called our attention to United States v. Ventresca * * *. The holding of the interesting and significant majority opinion in Ventresca might be summarized thus: in a doubtful or marginal case a search warrant may be based on hearsay so long as the magistrate is informed of the underlying circumstances which support the conclusion and belief of the affiant that this informer was credible or his information reliable; *while the affidavit must contain something beyond mere conclusions it is to be tested in a common-sense way* and probable cause for a search appears when a fair reading of the whole affidavit sets forth underlying circumstances based on observations of government

officers. The dissenting opinion in Ventresca by its protestations makes even clearer the holding of the majority since the dissent criticizes the acceptance of hearsay and speculation, failure to identify the informer and the absence of hard facts. We call attention to another similar decision: Rugendorf v. United States (376 US 528, 84 S. Ct. 825, 11 L. Ed. 887)." (Italics ours)

Finally, we quote from Mr. Justice Goldberg's opinion for a 6-3 majority in the Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 111:

> "Thus, when a search is based upon a Magistrates, rather than a police officers, determination of probable cause, the reviewing Court will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant', ibid., and will sustain the judicial determination so long as 'there was substantial basis for [a Magistrate] to conclude that narcotics were probably present * * * '."

Goldberg, J. having quoted the above portion of *Jones* v. *United States*, 362 U.S. 257, continued further to quote from *Johnson* v. *United States*, 333 U.S. 13:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime."

Since the wiretap-affidavit test is the same, we confidently await the application of this test to the McCabe, Rosen and Saltzman affidavits.

POINT IV

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
November 1966.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

RESPONDENTS' APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Respondents' Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Respondents' Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

RESPONDENTS' APPENDIX B

Order of Modification of Appellate Division Appealed From

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of November, 1965.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.

" MARCUS G. CHRIST,
" L. BARRON HILL,
" SAMUEL RABIN,
" A. DAVID BENJAMIN,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

CARL I. COHEN,
Respondent.

The above named The People of the State of New York, plaintiff in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on March 13, 1964 after a hearing, which (a)

granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as the result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom; and the People having filed the statement required by statute (Code Crim. Pro., Section 518-a) in order to perfect the appeal from said order herein, and the said appeal having been argued by Mr. William I. Siegel, Assistant District Attorney of Counsel for the appellant and argued by Mr. Eugene Gold of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed: and made a part hereof:

It is ordered that the order so appealed from be and the same hereby is unanimously modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as indicated in the opinion and decision slip of the court herein, dated November 29, 1965) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs, and as so modified, order so appealed from be and the same hereby is unanimously affirmed.

Enter:

Joseph J. Callahan
Clerk

RESPONDENTS' APPENDIX C

Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

At a Term of the Supreme Court held in and for the County of Kings on the 13th day of March 1964.

Present:

HON. DOMINIC S. RINALDI

Indictment Nos. 4028/1960
4029/1960
4146/1960
4280/1960
4281/1960

PEOPLE OF THE STATE OF NEW YORK,

—against—

CARL I. COHEN,

Defendant.

The defendant having moved this Court for an order declaring illegal and void a search and seizure made on September 2-3, 1960 of the defendant's office located at 5209—19th Avenue, Brooklyn, New York, and the defendant having moved this Court further for an order declaring illegal and void the use of wiretaps and restraining the District Attorney of Kings County and members of the Police Department of the City of New York from using the articles seized at the defendant's office and any informa-

tion or leads obtained as a result of said search and seizure and further restraining the District Attorney of Kings County and the members of the Police Department of the City of New York from using illegal and unlawful wiretaps and leads or information obtained therefrom, and suppressing their use upon the trial of the above named defendant and the issues raised by said motion having been duly heard and tried before this Court.

Now, on reading and filing the notice of motion dated October 24, 1962, and the affidavit of William W. Kleinman, Esq., sworn to October 24, 1962, and having heard William W. Kleinman, Esq., and Eugene Gold, Esq., attorneys for the defendant in support of the motion, and the District Attorney of Kings County by Elliott Golden, Esq., in opposition thereto, and on all the evidence adduced before the Court on the trial of the issues by said motion, and due consideration having been had and the Court having rendered its decision in writing, it is

ORDERED that said motion be and the same hereby is granted, and it is further

ORDERED that an ex-parte order issued on July 28, 1960, by then Supreme Court Justice James Vincent Keogh authorizing telephone wiretapping of the defendant's office telephone be and the same hereby is vacated and set aside, and it is further

ORDERED that the District Attorney of Kings County and all police officers of the City of New York, be and they are

Respondent's Appendix C—Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

hereby restrained and precluded from using upon the trial of the above-named defendant any and all articles of evidence seized or examined by police officers of the City of New York in the defendant's home and office on September 2-3, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of the articles of evidence seized or examined, and it is further

ORDERED that the District Attorney of Kings County and all police officers of the City of New York be and they are hereby restrained and precluded from using upon the trial of the above-named defendant any and all telephone conversations obtained as a result of telephone wiretapping of the defendant's office telephone pursuant to the ex-parte order of July 28, 1960, herein vacated and set aside, and any and all leads and clues or any information directly or indirectly obtained as a result of the use of said telephone wiretapping, and it is further

ORDERED that the District Attorney of Kings County be and he is hereby restrained and precluded from using upon the trial of the defendant the testimony of the female persons named in indictments 4028/60, 4029/60, 4146/60, 4280/60 and 4281/60, and it is further

ORDERED that the District Attorney of Kings County and the Police Department of the City of New York are hereby directed forthwith to return to the defendant Carl I. Cohen, or his attorneys, all of the property seized from his person

Respondent's Appendix C—Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

and office on September 2-3, 1960, and any and all photographs and photostatic copies, notes, or memoranda of the articles seized or examined.

ENTER

/s/ DOMINIC S. RINALDI
J. S. C.

Granted
Mar. 13, 1964
ROBERT J. CREWS
Clerk

RESPONDENTS' APPENDIX D

N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

RESPONDENTS' APPENDIX E

N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such

order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

RESPONDENTS' APPENDIX F

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Respondents' Appendix F—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure.

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were sufficient.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

RESPONDENTS' APPENDIX G

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of

Respondents' Appendix G—Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

Criminal Procedure, section 813-c et seq. and in any event never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N.Y.L.J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated.

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During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

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In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be obtained" in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no "probable cause" to search for mere "future" crimes and case law as to "probable cause" is concerned with "past" or "present" crimes (Brinegar v. United States, 338 U.S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of "probable cause" that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and "taps" made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself "reasonable grounds" or "probable cause" becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey

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Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they "accurately" confessed their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "* * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U.S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliability, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the

same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare instances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the

original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The Court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's

office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk celendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search

of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 F. 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.